CORRESPONDENCE.

July 11th, 1916.

Editor, Virginia Law Register,
Charlottesville, Va.

Dear sir:—

"Ubique gentium?"

In the case of Washington, etc., R. Co. *v.* Ward's Adm'r, decided by the Supreme Court of Appeals of Virginia on June 8th, and reported in 12 Va. App. 203, one of the questions upon which the appellate court ruled adversely to the contention of the plaintiff in error is thus disclosed in the opinion of the court:

"10. The defendant requested an instruction which the court gave with a qualification added thereto, and the defendant excepted to the latter. The instruction as given follows, the qualification complained of being indicated by the words in italics:

"'The court tells the jury that railroads owe no duty to children trespassing on their tracks or bridges, except the negative duty not to injure them after discovering their presence, *unless the jury further believe from the evidence that the bridge where the accident occurred had been constantly used by the public for some months, including children, and which fact was known to the defendant company.*'

"The defendant's theory of the case was that the child was a naked trespasser, while the plaintiff's theory was that he was a licensee. The evidence was conflicting upon this point, and the jury might have found either way upon it. The instruction as offered by the defendant ignored the latter theory and would, therefore, have been erroneous without the added qualification. The propriety of this qualification, as well as of the plaintiff's instruction set out in full in paragraph 7 of this opinion, is clearly shown by the *Carr, Blankenship* and *Rogers cases*, cited *supra*."

We fail to see how the position of the appellate court can be justified under the precedents in this state. As the instruction in its original form did not direct a verdict for the defendant (plaintiff in error), but merely announced the law defining the duty of the railway company to a trespasser according to the defendant's theory of the case, which there was evidence tending to prove, it would seem that the instruction was correct, and that the defendant's prayer should have been granted.

That the plaintiff (defendant in error) was entitled to an instruction upon the theory that his intestate was a licensee rather than a trespasser—a theory also finding countenance in the evidence in the cause—in no wise impaired the defendant's right to the instruction in question as requested by it.

Had the instruction directed a verdict, it should, of course, have incorporated both the defendant's theory and the plaintiff's theory of the case, leaving the application of the proper principles to the

jury as triers of facts. This would seem to be clear: A. C. L. R. Co. *v.* Caple, 110 Va. 514.

Nevertheless, since the instruction did not direct a verdict, it would seem equally clear that undertaking only to indicate the defendant's duty in a given state of facts, of which there was evidence before the jury, though the question of fact involved a conflict of testimony, the instruction was manifestly proper under the practice in Virginia as heretofore declared in a number of well-considered cases. For instance, in A. & D. R. Co. *v.* Rieger, 95 Va. 429, judge Buchanan thus states the law:

"By instruction No. 5 given for the plaintiff, the jury were informed that, if the view of an approaching train was obstructed as a traveler approached the crossing, a higher degree of care was required of the defendant in the running of its trains than if there had been no such obstructions; but it contained no statement that the plaintiff, under like circumstances, was also held to a higher degree of care. Nor was it necessary that it should contain the latter statement, although it was as clearly the law as was the former statement; for where the object of an instruction is merely to define the duty of the defendant arising out of a supposed state of facts, and it does not purport to contain a complete hypothesis on which a plaintiff suing for injuries caused by alleged negligence is entitled to recover, it is not necessary in such an instruction to refer to the duty or supposed negligence of the plaintiff."

Respectfully,

W. R. Rierson.

IN VACATION.

Philosophy of Sam Walter Foss.

One day through the primeval wood
A calf walked home, as good calves should;
But left a trail all bent askew,
A crooked trail, as all calves do.

Since then, three hundred years have fled,
And, I infer, the calf is dead.
But still he left behind this trail,
And thereby hangs my moral tale.

The trail was taken up next day
By a lone dog that passed that way;
And then a wise bell-wether sheep
Pursued the trail o'er vale and steep,

And drew the flock behind him, too,
As good bell-wethers always do.